Petition

81-2079

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Case No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TERRY LEE HENSEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a licensed driver of a truck leased to a trucking company pursuant to the regulation of the Interstate Commerce Commission and assigned to that driver by the trucking company retains an expectation of privacy in that truck notwithstanding the fact that the truck turns out to be stolen.

2. Whether a jury instruction on circumstantial evidence that reduces the burden of proof below the beyond a reasonable doubt requires reversal of the conviction.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. The Decision Below Misapplied This Court's Ruling In *Rakas v. Illinois*, 439 U.S. 128 (1978) and Approved A Warrantless Search and Seizure of A Truck That Was Unreasonable Under The Fourth Amendment to the United States Constitution 5

II. The Decision Below Approved A Jury Instruction on Circumstantial Evidence That Was Confusing And Misleading Because It Diluted The Standard Of Proof From Beyond A Reasonable Doubt To Merely A Preponderance Of the Evidence 7

CONCLUSION 10

CERTIFICATE OF SERVICE 11

APPENDIX (Opinion and Judgment of Court of Appeals) App.1

(Regulation of the Interstate Commerce Commission App.3

CITATIONS:

Cases:

Delaware v. Prouse, 440 U.S. 648 (1979) 5

In re Winship, 397 U.S. 358 (1970).....8, 9

Katz v. U.S., 389 U.S. 347 (1967).....5

Rakas V. Illinois, 439 U.S. 128 (1978) 5, 6

U.S. v. Hughes, 389 F.2d 535 (2d Cir. 1968) 9, 10

U.S. v. Link, 202 F.2d 592 (3rd Cir. 1953).....8

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Ohio.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 16, 1982. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

United States Constitution Amendment IV

The Right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Regulation of Interstate Commerce Commission 49 C.F.R. § 1057.11 and § 1057.12 appear in the appendix hereto.

STATEMENT OF THE CASE

At approximately 12:30 p.m. on March 6, 1980, Ohio State Trooper Mamula received a radio transmission regarding a "speeding southbound truck". He turned his car around and observed a maroon Kenworth truck pass. As the truck pulled off an exit ramp, the driver did not use the righthand turn signal. The truck also had short mud flaps and an expired Maine license plate evidenced by a sticker in the corner of the plate. As Trooper Mamula approached the truck, he observed a sign on the side of the truck connecting the truck to Pony Trucking Company and observed an Interstate Commerce Commission number which he knew, through past experience, represented that Pony Trucking either owned the truck or had the exclusive rights to use or control the truck.

After ascertaining that the driver had previously lost his license, he ran Mr. Hensel's social security number through the Ohio Bureau of Motor Vehicles computer and Mr. Hensel's chauffer's license was verified. Mr. Hensel could not produce the registration to the truck, so the license plate was entered into the computer and it came back registered to a 1972 Kenworth. The trooper then requested to see the serial number. Mr. Hensel said the cab of the truck did not have a serial number. Subsequently, Trooper Mamula got in the truck and verified that the highway use tax decal corresponded to a 1972 Kenworth.

At the time the trooper was getting out of the truck, he noticed a manufacturer's decal which had been scraped away. Mr. Hensel explained he scraped it off to avoid paying a $1,000.00 registration fee with Pony Trucking. He also admitted switching the plates on the truck—a common situation with truckers. At that time, the trooper decided to charge Mr. Hensel with fictitious

plates. Mr. Hensel was told to sit in the back of the patrol car and was interrogated without being advised of his "*Miranda* rights". After receiving suspicious statements from Mr. Hensel regarding Mr. Hensel's possession of the truck, the trooper read Mr. Hensel his "*Miranda* rights". Mr. Hensel then called his attorney. No traffic citations were ever written.

The truck was driven by Mr. Hensel to the Wintersville Impoundment Lot. The impounding lot was surrounded by a high fence and had a watchman on duty at all time. Without a search warrant, tape was peeled off the bumper and a serial number was discovered. The serial number belonged to a truck stolen from Fenton, Missouri, on January 16, 1980. Mr Hensel was arrested on state charges of theft.

The next day, the F.B.I. went to the impounding lot and Special Agent Richard Tomaso conducted a warrantless search of the truck. No search warrant was obtained because Agent Tomaso was unsure who to serve it on. Agent Tomaso took out of the cabin a "Driver's Log" book, a copy of which was later introduced at trial as Government's Exhibit No. 5. Subsequent to Agent Tomaso's search, Trooper Mamula returned to the truck without a warrant and removed the plates. These plates were later introduced at trial as Government's Exhibit No. 3.

On August 5, 1980 Terry Lee Hensel was named in a one county indictment charging him with a violation of 18 U.S.C. § 2313. The five month delay between Mr. Hensel's apprehension and his indictment was occasioned by his initial indictment by the State of Ohio on the same charges. When the State prosecution was dismissed, the Federal prosecution commenced.

He was arraigned on August 15, 1980 and thereafter filed a timely motion to suppress the objects seized from the truck. This motion was overruled by the trial court on November 12, 1980.

At the conclusion of the presentation of the evidence petitioner objected to positions of the Courts instructions to the jury but these objections were overruled. On November 17, 1980 the jury found petitioner guilty as charged and he was subsequently sentenced to four years imprisonment. This judgment was duly appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the judgment on March 16, 1982.

REASONS FOR GRANTING THE WRIT

I. THE WARRANTLESS SEIZURE AND SEARCHES ON MARCH 6, 1980 AND MARCH 7, 1980 OF THE TRUCK THE DEFENDANT WAS DRIVING WAS UNREASONABLE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND THE FRUITS OBTAINED SHOULD HAVE BEEN SUPPRESSED AT TRIAL.

Wherever an individual may be, "he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. U.S.*, 389 U.S. 347, 359 (1967). A person "operating or travelling in an automobile does not lose all reasonable expectations of privacy simply because the automobile and its use are subject to government regulation." *Delaware v. Prouse*, 440 U.S. 648, 660 (1979).

The initial inquiry in the instant case must be whether Mr. Hensel, as driver of a truck leased to a valid trucking company, had a legitimate expectation of privacy in such truck that his rights would be violated by the seizure and search of such truck, *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). At the hearing on the motion to suppress, the trial court held that the only evidence presented concerning the motion is that the defendant was driving a stolen truck. However, adequate evidence was presented to the court establishing a valid expectation of privacy on the part of Mr. Hensel.

When Mr. Hensel was stopped, Officer Mamula observed a sign on the side of the truck connecting the truck to the Pony Trucking Company. He observed an I.C.C. number which he knew, through past experience,

represented that Pony Trucking either owned the truck or had the exclusive right to use or control the truck. See 49 C.F.R. §§1057.11 and 1057.12 (1979). While not the owner, as a driver for Pony Trucking, Mr. Hensel had a legitimate expectation of privacy in the truck which he used for long distance hauling and equipped with a sleeping birth cordoned off from the rest of the cab with a curtain.

The trial court held that a person cannot achieve a right of privacy when driving a stolen truck. However, the government expressly refuted the contention that Mr. Hensel stole the truck. The truck was under the use and control of Pony Trucking and such right of use and control was delegated to Mr. Hensel. Mr. Hensel had "the right to exclude other . . . and one who lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." *Rakas, supra*, at 143-4 and n. 12.

The initial search of the cabin of the truck by Trooper Mamula was unreasonable. Mr. Hensel's license and registration was verified by computer check and Trooper Mamula did not believe anything other than a minor traffic violation had been committed. Instead of issuing a citation, he called for a back-up to search the truck which produced evidence that the manufacturer's decal had been scraped away. The truck was subsequently taken to an impounding lot which was surrounded by a high fence and had a watchman on duty at all times. Without a warrant, Trooper Mamula lifted tape off the bumper which produced a serial number. This number, when checked, came back registered to a stolen truck.

The next day, March 7, 1980, F.B.I. Special Agent Richard Tomaso conducted a warrantless search of the truck. He was uncertain who the thief was. He did not

obtain a search warrant because he did not know who were the "owners." Agent Tomaso was aware of the nature of a truck lease and its indicia of use and control. At the time of his search, he removed a "Driver's Log", later introduced as Government's Exhibit No. 5. Trooper Mamula later conducted a warrantless search of the truck and seized license plates belonging to Mr. Hensel, later introduced as Government Exhibit 3.

The procedures used in this case, once the truck had been impounded show a blatant disregard for the warrant requirement. The fact that the "owner" of the truck is undetermined is irrelevant to Mr. Hensel's expectation of privacy in the Vehicle. This truck was his "home on the road" and he had authority from Pony Trucking to use it, control it and exclude others. Even if ownership were determinative of the issue, which it is not, no attempt was made to secure a consent to search from the owner or anyone else connected with the truck. The fact that subsequent to the search, the truck is verified as stolen, and certain fruits of the search are incriminating does not convert an illegal search at the outset to a legal search. All evidence, tangible and intangible should have been suppressed.

II. THE DISTRICT COURT'S INSTRUCTION TO THE JURY WERE CONFUSING AND MISLEADING BECAUSE THEY DILUTED THE STANDARD OF PROOF FROM BEYOND A REASONABLE DOUBT TO MERELY A PREPONDERANCE OF THE EVIDENCE.

Petitioner objected to two portions of the court's instructions to the jury which petitioner contended

diluted the proof beyond a reasonable doubt standard that is constitutionally required. *In re Winship*, 397 U.S. 358 (1970). The challenged language was as follows:

> "If you as a juror view the evidence as reasonably permitting either of two conclusions, one of innocence, the other of guilt you must adopt the conclusion of innocence."
>
> "If the circumstances create inferences that are equally consistent with either innocence or guilt, such inferences must be resolved in favor of the defendant's innocence."

Our objection to the above quoted instructions was for the following reasons:

> "The basis for the objection is that if the jury thinks about that sentence, they may get confused and think the burden of proof is less than the reasonable doubt, merely a preponderance. They may take the adverse and say if you have two conclusions and one is a little more for guilt than the other but not beyond a reasonable doubt they would find for guilty."

The objection was overruled.

Similar jury instructions have been held to constitute reversible error. In *United States v. Link*, 202 F.2d 592, 594 (3rd Cir. 1953) the language requiring reversal was as follows:

> "You are further instructed that if you find the evidence as to this defendant equally balanced, that is, that it is as consistent with innocence as it is with guilt, you must acquit the defendant and find him not guilty. In other words, if after you consider all of the evidence and you put it in the scales an— you weigh it in your minds you honestly and conscientiously find and believe that the evidence as it has been produced here is equally consistent with the innocence of this man as it is with his guilt, you must acquit him and find him not guilty, because as I said, he must be proven guilty beyond a reasonable doubt. . .
>
> and so. . . if you find the evidence respecting the defendant is as consistent with his innocence as with his guilt, you must acquit him."

In *United States v. Hughes*, 389 F.2d 535, 537 (2d Cir. 1968) the court quoted the following instruction:

> "In the final analysis, then, if you find that the evidence respecting the defendant is as consistent with innocence as with guilt, or that it is more likely that the defendant is innocent than guilty, then you should acquit him. . .

and stated, "This instruction erroneously allowed the jury to use a preponderance of evidence standard in a criminal case."

In the case at bar, petitioner relied on his constitutional right to require the government to prove his guilt beyond a reasonable doubt. *In re Winship, supra.*

Thus it was essential for him to prevail that the jury be properly instructed on the reasonable doubt standard. That they were not is clear from the holdings in *Link*, *supra*, and *Hughes*, *supra*.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 7 day of May, 1982, a copy of the foregoing Petition for a Writ of Certiorari to United States Court of Appeals for the Sixth Circuit was mailed, postage prepaid, to the Solicitor General of this United States, Department of Justice, Washington, D.C. 20530.

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Appendix

APPENDIX

No. 81-3066

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Terry Lee Hensel,
Defendant-Appellant.

APPEAL from the United States District Court for the Southern District of Ohio.

Decided and filed March 16, 1982.

Before: Lively and Keith, Circuit Judges; and Phillips, Senior Circuit Judge.

Per Curiam. On appeal from a jury conviction for receipt of a stolen motor vehicle which had moved in interstate commerce, the defendant-appellant raises two issues which require discussion. In the first place he contends that the district court abused its discretion in denying his motion for a continuance. The purpose of the requested continuance was to obtain the presence at the trial of one or more witnesses whom the defendant had attempted to subpoena. The district court denied the motion for a continuance conditionally and held a hearing on the defendant's motion to suppress evidence. The defendant contended that a witness whom he had

not been successful in subpoenaing could provide material evidence on the suppression issue. The defendant was not able to inform the court of the exact whereabouts of the witness or state that the witness would be present at a later time. The court then permitted the defendant to make a proffer of the testimony which he believed the witness would give if present. At the conclusion of the suppression hearing the district court found that even if the absent witness had been present and had testified as stated in the proffer, such testimony would not have changed the result and the court would have denied the motion to suppress. We find no abuse of discretion in the district court's denial of the motion for a continuance.

The second issue raised by the defendant relates to the search of a truck which he was driving at the time he was stopped by a law enforcement officer. When the defendant was unable to produce a driver's license or the registration for the truck, the officer asked the defendant to show him the serial number of the truck. At that time the defendant informed the officer that the truck had no serial number and the officer entered the cab of the truck and noticed that part of a manufacturer's decal had been scraped away. After taking possession of the truck the officer found its serial number by removing a black tape which had been placed over that number. It was then learned that a truck with that serial number had been reported stolen some six weeks earlier.

The district court held that the defendant had no legitimate expectation of privacy in the stolen truck and thus had no standing to contest the warrantless search of the truck which produced the evidence that it was stolen. We agree with the district court that the defendant lacked standing to challenge the search of the truck because he had no legitimate expectation of privacy in the stolen

vehicle or its contents. *United States* v. *Hargrove*, 647 F.2d 411 (4th Cir. 1981); *see Rakas* v. *Illinois*, 439 U.S. 128, 143-44 & n. 12 (1978). The motion to suppress was properly denied.

We have considered the other issues raised by the defendant in his brief and conclude that they have no merit.

The judgment of the district court is affirmed.

Subpart B—Leasing Regulations

§ 1057.11 General leasing requirements.

Other than through the interchange of equipment as set forth in § 1057.31, and under the exemptions set forth in subpart C of these regulations, the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions:

(a) *Lease.*—There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 1057.12.

(b) *Receipts for equipment.*—Receipts, specifically identifying the equipment to be leased and stating the date and time of day possession is transferred, shall be given as follows:

(1) When possession of the equipment is taken by the authorized carrier, it shall give the owner of the equipment a receipt.

(2) When possession of the equipment by the authorized carrier ends, it shall obtain a receipt from the owner.

(3) Authorized representatives of the carrier and the owner may take possession of leased equipment and give and receive the receipts required under this subsection.

(c) *Identification of equipment.* – The authorized carrier acquiring the use of equipment under this section shall identify the equipment as being in its service as follows:

(1) During the period of the lease, the carrier shall identify the equipment in accordance with the Commission's requirements in Part 1058 of this chapter (Identificaition of Vehicles). Upon termination of the lease, the authorized carrier shall remove all identification showing it as the operating carrier before giving up possession of the equipment.

(2) Unless a copy of the lease is carried on the equipment, the authorized carrier shall keep a statement with the equipment during the period of the lease certifying that the equipment is being operated by it. The statement shall also specify the name of the owner, the date and length of the lease, any restrictions in the lease relative to the commodities to be transported, and the address at which the original lease is kept by the authorized carrier. This statement shall be prepared by the authorized carrier or its authorized representative.

(d) *Records of equipment.*—The authorized carrier using equipment leased under this section shall keep records of the equipment as follows:

(1) If the equipment is being leased for periods of less than 30 days, the authorized carrier shall prepare and keep documents covering each trip for which the equipment is used in its service. These documents shall contain the name and address of the owner of the equipment, the point of origin, the time and date of departure, and the point of final destination. Also, the authorized carrier shall carry papers with the leased equipment during its operation containing this information and identifying the lading and clearly indicating that the transportation is under its responsibility. These papers shall be preserved by the authorized carrier as part of its transportation records. Trip leases which contain the information required by the provisions in this paragraph may be used and retained instead of such documents or papers.

(2) If the equipment is being leased for periods of 30 days or more, the authorized carrier shall comply with the provisions of paragraphs (d)(1) of this section, but it may keep the required information at its terminals or principal office as part of its records rather than with the leased equipment.

§ 1057.12 Written lease requirements.

Except as provided in the exemptions set forth in Subpart C of these regulations, the written lease required under § 1057.11(a) shall contain following provisions:

(a) *Parties.*—The lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or by their authorized representatives.

(b) *Duration to be specific.*—The lease shall specify the time and date or the circumstances on which the lease begins and ends. These times or circumstances shall coincide with the times for the giving of receipts required by § 1057.11(b).

(c) *Minimum duration of 30 days when operated by owner.*—The period for which the lease applies shall be for 30 days or more when the equipment is to be operated for the authorized carrier by the owner or an employee of the owner.

(d) *Exclusive possession and responsibilities.*—The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

(e) *Compensation to be specified.*—The amount to be paid by the authorized carrier for equipment and driver's services shall be clearly stated on the face of the lease or in an addendum which is attached to the lease. Such lease or addendum shall be delivered to the lessor prior to the commencement of any trip in the service of the authorized carrier. An authorized representative of the lessor may accept these documents. The amount to be paid may be expressed as a percentage of gross revenue,

a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any other method of compensation mutually agreed upon by the parties to the lease. The compensation stated on the lease or in the attached addendum may apply to equipment and driver's services either separately or as a combined amount.

(f) *Items specified in lease.*—The lease shall clearly specify the responsibility of each party with respect to the cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and any unused portions of such items.

(g) *Payment period.*—The lease shall specify that payment to the lessor under permanent or trip lease to the authorized carrier shall be made within 15 days after submission of the necessary delivery documents and other paperwork concerning a trip in the service of the authorized carrier. The lease shall clearly specify the delivery documents and other paperwork that must be submitted before the lessor can receive payment.

(h) *Copies of freight bill.*—Subject to the right of the authorized carrier to delete the names of shippers and consignees shown on the freight bill, the lease shall specify that the authorized carrier shall give a copy of the rated freight bill before or at the time of settlement to those lessors whose revenue is based on a percentage of the gross revenue for a shipment. The lease shall clearly specify the right of the lessor, regardless of method of compensation, to examine copies of the carrier's tariff.

(i) *Charge-back items.*—The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at time of payment or settlement.

(j) *Products, equipment, or services from authorized carrier.*—The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.

(k) *Insurance.*—(1) The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to Commission regulations under 49 U.S.C. 10927. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as bobtail insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor.

(2) If the lessor purchases any insurance coverage for the operation of the leased equipment from or through the authorized carrier, the lease shall specify that the authorized carrier will provide the lessor with a copy of each policy upon the request of the lessor. Also, where the lessor purchases such insurance in this manner, the lease shall specify that the authorized carrier will provide the lessor with a certificate of insurance for each such policy. Each certificate of insurance shall include the name of the insurer, the policy number, the effective dates of the policy, the amounts and types of coverage, the cost to the lessor for each type of coverage, and the deductible amount for each type of coverage for which the lessor may be liable.

(3) The lease shall clearly specify the conditions under which deductions for cargo or property damage may be made from the lessor's settlements. The lease shall further specify that the authorized carrier must provide the lessor with a written explanation and itemization of any deductions for cargo or property damage made from any compensation of money owed to the lessor. The written explanation and itemization must be delivered to the lessor before any deductions are made.

(l) *Escrow funds.*—If escrow funds are required, the lease shall specify:

(1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest

must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the Lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor or all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

(m) *Copies of the lease.*—An original and two copies of each lease shall be signed by the parties. The authorized carrier shall keep the original and shall place a copy of the lease on the equipment during the period of the lease unless a statement as provided for in § 1057.11 (c)(2) is carried on the equipment instead. The owner of the equipment shall keep the other copy of the lease.